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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1966

PROHIBITION PARTY OF MICHIGAN, et al., Appellants, vs. JAMES M. HARE, SECRETARY OF STATE FOR MICHIGAN, et al., Appellees.	No. 1098

On Appeal From The Supreme Court For The State Of Michigan

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the above entitled cause be dismissed or affirmed on grounds that no substantial federal question is presented.

Statement

Appellants challenge the constitutionality of Section 685 of Act 116, PA 1954, the Michigan Election Law, as last amended by Act 312, PA 1965, CL 1948 §168.685 MSA 1965 Cum Supp §6.1685. Said section requires that for a new party to be entitled to have its party ticket and the names of candidates nominated by it printed upon the general election ballot, there must be presented to the Secretary of State a petition bearing the signatures of registered and

qualified electors of the state equal to not less than 1% nor more than 4% of the votes received by the successful candidate for the office of Secretary of State at the last general November election. Petitions are required to be signed by at least 100 residents in each of at least 10 counties and not more than 35% of the minimum required number may be by resident electors of any one county.

Such requirement is not applicable to any party whose ticket was printed upon the ballot at the preceding general election, unless the total vote cast for the principal candidate of that party at such election was less than one per cent of the number of votes cast for the successful candidate for the office of Secretary of State at such election, or at the last election at which a Secretary of State was elected.

Not having complied with the requirements of that section, Appellants sought an order of the Michigan Supreme Court requiring the printing of its party ticket on the ballot for the ensuing general election on the theory that the statutory requirements are so unreasonable as to be constitutionally defective.

The Michigan Court of Appeals, on October 19, 1966, dismissed the complaint without opinion. The Michigan Supreme Court granted leave to appeal and concurrently dismissed the complaint on October 21, 1966 "for the reason that a meritorious basis is not shown."

Argument

The provisions of Section 685 are specifically authorized by Section 4 of Article II of the Michigan Constitution of 1963, and were also authorized by Section 8 of Article III of the Michigan Constitution of 1908. The provisions

of said section reasonably regulate the time, place and manner of all nominations and elections in order to preserve the purity of elections and to guard against abuses of the elective franchise.

Appellants recognize in their brief that restrictions upon the right of political parties to have their party ticket printed upon the election ballot may be validly imposed but question the reasonableness of the restrictions prescribed by Section 685. Obviously reasonable restrictions are permissive, otherwise a "bed sheet" ballot would undoubtedly be required upon which to print any ticket which would otherwise be certified by numerous parties regardless of whether there was sufficient support for them within the state to justify their inclusion on the ballot.

Appellants characterize the "model election law" of the American Civil Liberties Union which prescribes a maximum limitation of 10,000 signatures as a "reasonable statute" and suggest that had the legislature enacted that statute appellants' party would have been able to qualify.

We suggest that whether the required percentage should be 1/10 of 1% of the total vote cast for all candidates for Governor, or 1% of the vote cast for the successful candidate for Secretary of State, and whether a maximum limitation of 10,000 or some other number of votes should be prescribed, are questions of policy vested by the State Constitution in the Michigan legislature.

Appellants criticize the legislative selection of votes cast for the office of Michigan Secretary of State, instead of some other office upon which the required number of signatures shall be determined. However, one familiar with the policy and rationale of the Michigan Election Law will recognize that the legislature selected an office, the candi-

date for which will normally receive a fairly constant percentage of the vote. In selecting that office the legislature avoided the office of Governor which is designated in the model election law in order to avoid the fluctuation in the total votes received by a particularly popular candidate, such, for example, as G. Mennen Williams or George Romney. We suggest that the designation of the office of Secretary of State rather than the office of Governor supports the reasonableness of the requirements of Section 685.

Appellants also complain of the requirements of the statute that signers on individual petitions be limited to electors of a given city or township. Such requirement is not confined to petitions of a party seeking to have its ticket printed upon the ballot. Similar requirements as to a candidate's nominating petitions have been in effect for many years. CL 1929 §2871. Such requirement was continued and is presently part of Section 544c of the Michigan Election Law, MSA 1965 Cum Supp §6.1544(3).

Prior to 1941 signers of petitions for amendment to the Constitution, as well as initiative and referendum petitions, were only required to be "qualified" electors. The abuse upon occasion of the constitutional right for circulating and filing such petitions was evidenced by the decision of the Michigan Supreme Court in *Michigan State Dental Society v. Secretary of State,* (1940) 294 Mich 503; 293 NW 865. Shortly following the issuance of that opinion, the Michigan legislature at its 1941 regular session proposed amendments to Section 1 of Article V and Section 2 of Article XVII of the 1908 Constitution. Such amendments were ratified by the people at the biennial spring election of 1941 and implemented by Act 246, PA 1941, CL 1948 §200.1, et seq; MSA §6.6851 et seq. Such constitutional requirements were

continued in the 1963 Constitution and implementing statutes. [1]

As a practical matter, the requirement that signers be registered as well as qualified electors and that the signers of a given petition be limited to residents of a particular city or township permits where necessary for determining the validity of the signatures upon such petitions. The desirability of provisions making possible a determination as to the validity of signatures upon petitions is demonstrated by the decision of the Michigan Supreme Court in *Keyes v. Secretary of State,* (1960) 360 Mich 610; 104 NW 2d 781.

Section 685 further specifies that not more than 35% of the minimum required signatures will be by residents of any one county and that at least 100 signatures be those of residents of each of at least 10 counties.

Appellants sought to have their ticket printed upon the ballot for a state-wide—not a local—election. Obviously the purpose of such statutory requirement is to evidence the existence of at least a reasonable state-wide—as distinguished from purely local—support for the particular party. We suggest that such nominal requirement is obviously reasonable.

Appellants further complain of the resulting necessity for a fairly substantial organization and the practical necessity of at least minimal financing. Such requirement is

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[1]

Petitions for constitutional amendments: Section 2 of Article XII of the Constitution, MSA 1965 Cum Supp §6.1471, et seq.

Initiative and referendum petitions: Section 9 of Article II of the Constitution.

not peculiar to a particular party seeking to engage in a state campaign but rather is a fact of life for election to any state office. Appellants' argument in this respect can hardly be said to be based upon constitutional grounds of invidious discrimination or lack of reasonable grounds for classification. As the court held in *Tomlinson v. Tomlinson*, (1953) 338 Mich 274; 61 NW 2d 102:

> "On the narrower phase of the question we merely observe that the guaranty of equal protection of the law is not one of equality of operation or application to all citizens of the State or nation, but rather one of equality of operation or applicability within the particular class affected. * * *." p. 278.

As a preface to considering the authorities cited by appellants, it is pointed out that no qualified elector is prevented from voting and no candidate is prevented from receiving votes for any office by virtue of the requirements of Section 685. The Michigan statutes have for several decades made provisions for the voting for a candidate whose name does not appear on any ticket printed on the ballot by means of write-in or sticker. There is printed upon each of the partisan election paper ballots for use at each general November election instructions as required by Section 706 of Act 116, PA 1954, the Michigan Election Law, as last amended by Act 56, PA 2d Ex Sess of 1963, MSA 1965 Cum Supp §6.1706. Included in such instructions is:

> "If you wish to vote for a candidate not on any ticket, write or place the name of such candidate on your ticket opposite the name of the office."

Such instruction is based upon the following statutory pro-

vision, Section 737(4) of Act 116, as amended, CLS 1961 §168.737(4), MSA 1956 Rev Vol §6.1737(4):

> "If the elector wishes to vote for a candidate not on any ticket, he may write or place the name of such candidate on his ticket opposite the name of the office and make a cross (X) in the circle under the party name; • • •."

Provisions comparable to Section 737(4) were included in CL 1929 §3111 and CL 1948 §178.19(4), and comparable provision in slightly different wording is contained in Section 11(4), Chapter 10 of Act 203, PA 1917, and the predecessor statute CL 1915 §3697; Section 26 of Act 214, PA 1901, and in CL 1897, §3636; Section 26 of Act 59, PA 1897, and Section 26 of Act 202, PA 1893. See also Section 26 of Act 190, PA 1891.

As evidenced by the above-cited statutes, the right to vote for a candidate whose name is not printed upon the ballot by write-in or sticker has been guaranteed by the Michigan statute for some 75 years. We suggest that such right is a matter of common knowledge among the general public, as well as among local election officials, including members of boards of election inspectors for the several precincts.

For the benefit of any elector whose recollection as to the proper method of voting by write-in or sticker needs to be refreshed, directions with respect thereto are, as required by the above-quoted statute, printed near the top of each ballot.

Thus, the issue presented here is not the right of any elector to vote for candidates nominated or endorsed by the Prohibition Party. Rather, the issue is the right of a party to have its party ticket and the names of its nominees

printed upon the official general election ballot.

Appellants concede the existence of a decision of the United States Supreme Court in which the court rejected the contentions here urged. *MacDougall v. Green*, 335 US 281; 93 Led 3 (1948). That case involved the validity of a similar Illinois statute, the distinction being the more exacting requirements imposed by that statute. It specified that the petition for a new political party must contain 25,000 valid signatures, including at least 200 from at least 50 of the state's 102 counties. The majority opinion held that the statute was not so discriminatory in its application as to amount to a violation of due process, equal protection, or the privileges and immunities clauses of the 14th Amendment or other provisions of the United States Constitution.

Mr. Justice Rutledge concurred because of the impracticality of granting injunctive relief so close to the ensuing election. Counsel stresses the dissenting opinion by Mr. Justice Douglas with whom Justices Black and Murphy concurred. We suggest that the following quotations from that opinion disclose that each of the dissenters might well have concurred in the majority opinion had the validity of the Michigan statute rather than the Illinois statute been presented.

Justice Douglas stated in *MacDougall* at 335 US 289; 93 Led 10:

> "• • • There is no attempt here, as I have said, to make the required signatures even approximately proportionate to the distribution of voters among the various counties of the state. No such proportionate allocation could of course be mathematically exact. Nor would it be required. But when, as here, the law applies a rigid, arbitrary formula to sparsely settled counties

and populous counties alike, it offers no basis whatever to justify giving greater weight to the individual votes of one group of citizens than to those of another group. * * *."

Appellant cites later cases in which this court has cited *MacDougall*. His argument is to the effect that this court would no longer recognize that decision. However, this court has never overruled *MacDougall*. Furthermore, the cases cited by counsel in which reference to that decision is made did not involve the issue there and here presented, i.e. validity of requirements of a statute providing for petitions for a new political party.

Baker v. Carr, 369 US 186; 7 L.ed 2d 663 (1962), only held that a complaint based upon the failure of the Tennessee legislature to reapportion the legislative seats of that state was a justiciable couse of action of which the Federal Court would take jurisdiction.

Gray v. Sanders, 372 US 368; 9 L.ed 2d 821 (1962), involved the validity of the Georgia county unit system; *Lucas v. Colorado General Assembly*, 377 US 713; 12 L.ed 2d 632 (1964); *Scholle v. Secretary of State*, 367 Mich 176 (1962); *Reynolds v. Sims*, 377 US 533; 12 L.ed 506 (1964), were each legislative apportionment cases. The excerpts from certain of the opinions in those cases in which reference is made to the court's decision in *MacDougall* should be read in the light of the issue there presented. We, therefore, urge:

1. *MacDougall v. Green* is controlling authority against appellants' contentions and not having been overruled by the United States Supreme Court should be followed as present law.

2. The requirements of the Illinois statute, the validity of which was involved in MacDougall, were such as to render that statute much more vulnerable to the criticism made thereof in the dissenting opinion of Justice Douglas than would the Michigan statute herein involved. We suggest that the probabilities are that had the same court passed upon the validity of the Michigan statutes instead of the Illinois statutes, the three dissenting justices might well have upheld the requirements of our statute as being entirely reasonable.

Appellants cite, in addition to the apportionment cases, *Nixon v. Herndon*, 273 US 536, 71 L. ed 759 (1926) as examples of the protection afforded by this Court against arbitrary and unreasonable discrimination against the exercise of the right of franchise. In *Nixon* this Court struck down a Texas statute which purported to disqualify Negroes from participating in Democratic Party primary elections.

We reiterate that, in the case at bar, electors are in no way restricted from voting for any candidate of their choice. Should they see fit they may vote for a candidate for any office who is either nominated or supported by the Prohibition Party.

With respect thereto, this further word of explanation should be furnished. The affidavit of Bernard J. Apol, Assistant Director of Elections of the State of Michigan, is attached to the answer of appellees as filed in this case in the Court of Appeals. Attached to that affidavit as Exhibits A and B are copies of one page of each of two election manuals for use by Boards of Election Inspectors as published in 1961. Those contain instructions for voting by write-in or sticker for candidates whose names are not printed on the ballot. However, it is also stated that no

sticker vote will be counted for President or Vice President. This resulted from a previous ruling based upon the fact that while the names of the candidates for President and Vice President are printed on the ballot in the presidential years in Michigan, as a matter of fact the electors do not vote directly for them but instead for candidates for the office of presidential electors. As a result of a subsequent action in the Michigan Supreme Court, *Munn et al v. Secretary of State et al,* Calendar 51041 (1964), the officers of the Prohibition Party filed with the Secretary of State a certified copy of the names of its nominees for the office of President and Vice President and the list of presidential electors chosen by that Party. Votes cast for those candidates by write-in or sticker at the 1964 general election year were in fact counted.

The Appellees suggest that none of the cited decisions is authority for holding the Michigan statutory provision to be so unreasonable as to be subject to constitutional infirmities.[2] In Appellees' view it is moreover apparent that the rationale of the Michigan Supreme Court in *Cady v. City of Detroit,* (1939) 289 Mich 499; 286 NW 805, is particularly applicable to the instant case. The Michigan Court in its opinion in *Cady* stated, at page 508, as follows:

> "A statutory determination will not be set aside as denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it. *Metropolitan Casualty Ins. Co. v. Brownell,* 294 U.S. 580 (55 Sup. Ct. 538); *Naudzius v. Lahr,* 253 Mich. 216

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[2]

States having similar statutory provisions are: Conn. G.S.A. §9-72; Maine Rev. Stats. A., Title 21 §445; Gen. Stats. N.C. §163-1; Ohio Rev. Code A. §3517.00; Wis. Stat. A. §5.19; Burn Ind. Stat. §29-3801; Vernons Texas Civil Stat. Art. 13.50 and Ill. Stat. Ann., Chap. 46 §10-2.

(74 A.L.R. 1189, 30 N.C.C.A. 179). It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such a contrariety. *Borden's Farm Products Co., Inc. v. Baldwin*, 293 U.S. 194 (55 Sup. Ct. 187). * * *."

Conclusion

The enactment of Section 685 is specifically authorized by Article II, Section 4 of the present Michigan Constitution, and was previously authorized by Article III, Section 8 of the Michigan Constitution of 1908. Said provision in no way limits the right of Michigan electors to vote for candidates nominated or endorsed by the Prohibition party.

Section 685 of the Michigan Election Law clearly constitutes reasonable state regulation of the time, place and manner of nominations and elections and said provision is intended and does in fact guard against abuse of the elective franchise, thus helping to preserve the purity of the Michigan election process.

Appellees respectfully submit that this appeal does not, therefore, raise any serious or substantial question under the equal protection and due process clauses of the Fourteenth Amendment.

Wherefore, Appellees pray that the above entitled cause of action be dismissed or affirmed.

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APPEAL FROM THE SUPREME COURT OF MICHIGAN.

No. 1098. Decided April 24, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

END